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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

EUGENE R. ANDERSON,
LUVERNE L. ANDERSON,
WAYNE A. ANDERSON, and
RAYMOND G. NULL,

Petitioners,

vs.

STATE OF CALIFORNIA,
EVELLE J. YOUNGER, Attorney
General of California and
CALIFORNIA STATE BOARD OF
CHIROPRACTIC EXAMINERS,
an administrative agency of the
STATE OF CALIFORNIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioners, Eugene R. Anderson, Luverne L. Anderson, Wayne A. Anderson, and Raymond G. Null respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court

of Appeals for the Ninth Circuit entered in this proceeding on June 19, 1972.

OPINION BELOW

The opinion of the Court of Appeals appears in the appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 19, 1972. A timely petition for rehearing en banc was denied on July 17, 1972, and this petition for certiorari was filed within ninety days of that date. This court's jurisdiction is invoked under 28 U.S. Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether the federal courts can refuse to accept jurisdiction of a case upon the ground of res judicata, although substantial questions of free speech and due process have not been decided in the state courts.

2. Whether petitioners have suffered the application of ex post facto law by reason of the enactment by the California legislature of a statute during the time of the appeal in the state courts.

STATUTORY PROVISIONS INVOLVED

Business and Professions Code Sections 651, 651.2 and 652, of the State of California.

STATEMENT OF THE CASE

Respondents filed an accusation against petitioners for alleged violation of Sections 650 and 651 of the Business and Professions Code of California, prohibiting chiropractic services at a discount. Section 652 makes such violation a misdemeanor. Petitioners suffered the suspension of their licenses as chiropractors because they advertised in newspapers free x-rays offered to determine whether an ailment could be helped by chiropractic treatment. Petitioners filed a writ of mandate in the Superior Court of San Diego County, California, which was granted, but was reversed by the Court of Appeal of California. During the appeal, a new section was enacted, prohibiting free x-rays. A hearing in the Supreme Court of this state was denied.

Petitioners then filed suit in the United States District Court for the Southern District of California, seeking to declare said sections unconstitutional and for stay of suspension of their licenses. Respondents moved to dismiss the complaint upon the ground that it was barred as res judicata because of the state proceedings. The District Court dismissed the complaint and denied a motion for a stay of suspension.

Petitioners filed Notice of Appeal to the United States Court of Appeals for the Ninth Circuit and a motion for a stay of the suspension of their licenses, pending the appeal, but said motion was denied by an

order of said court, dated April 19, 1971 without opinion.

Petitioners applied to the Court of Appeals for a stay in order to permit the filing of a petition for a writ of certiorari to this Honorable Court. The Court of Appeals on May 3, 1971, denied that application.

Petitioners then made a motion for a stay of the suspension of their licenses in this court, and Justice William O. Douglas, on June 9, 1971, granted a stay until the appeal of the United States Court of Appeals had been concluded.

The United States Court of Appeals for the Ninth Circuit affirmed the decision below. A stay of the mandate has been granted pending the filing of this writ for certiorari.

REASONS FOR GRANTING THE WRIT

1. THE UNITED STATES DISTRICT COURT DID NOT APPLY THE DOCTRINE OF RES JUDICATA IN ACCORDANCE WITH THE APPLICABLE DECISIONS OF THIS COURT.

Petitioners alleged in the state proceedings that they were denied free speech and due process of law, under the federal Constitution. The opinion of the Court of Appeals below affirmed the decision of the United States District Court upon the ground that this case is indistinguishable from Flynn v. State Board of Chiropractic Examiners, 418 F. 2d 668. This case held that it was immaterial whether or not the constitutional issues were actually litigated in the state court, because

the doctrine of res judicata bars every issue that might have been raised. Petitioners argued in the petition for rehearing below that the doctrine of collateral estoppel applied, and that only determinations which were actually made and essential to the decision were barred from consideration by the federal courts. United States v. Granello, 365 F.2d 990; Yates v. United States, 354 U.S. 298.

If the cause of action is not the same but the parties are, then collateral estoppel by judgment must be applied rather than res judicata. Cromwell v. County of Sacramento, 94 U.S. 351; Lawlor v. National Screen Service Corp. 349 U.S. 322; United States v. Munsingwear, Inc., 340 U.S. 36. The parties under these circumstances are not precluded from raising and litigating matters which were not adjudged even though they could have been raised and litigated in the other suit.

One test for determining if a cause of action is identical is whether the same evidence would suffice to sustain both judgments. United States v. Haytian Republic, 145 U.S. 188; Kelliher v. Stone and Webster, 75 F.2d 331, 333. In the case at bench the question of the violation of the Business and Professions Code of California by the advertisements of plaintiffs involves evidence which is not concerned with the constitutionality of the sections themselves.

The federal courts can take jurisdiction of a case based on the denial of constitutional guarantees, even though the state courts have refused to do so. The purpose of filing the United States District Court action by petitioners, under 28 U.S. Code, Sections 1331, 2281 and 2284, was to declare unconstitutional sections of the Business and Professions Code as applied to

petitioners. This is entirely different than the state court proceedings, which were concerned only with the question of the revocation of chiropractic licenses held by petitioners.

In the case of Dowd v. Hodge, 350 U.S. 485, the United States Supreme Court held in a case involving the regulation of community currency exchanges, that the United States District Court had jurisdiction to entertain an action under 28 U.S. Code on the ground of alleged repugnance to the federal constitution, simply because the state courts had not yet rendered a clear or definite decision as to the meaning or federal constitutionality of the state statute, as in the case at bench.

2. THIS COURT SHOULD DECIDE THE IMPORTANT QUESTION WHETHER THERE HAS BEEN AN INVALID APPLICATION OF EX POST FACTO LAW AND A VIOLATION OF DUE PROCESS.

The new statute prohibiting free x-rays was enacted by the legislature of California while an appeal was pending from the revocation of petitioners' licenses.

The courts below have ruled that the new statute was not involved in their decision and thus in effect have held that the enactment of the new statute was a fruitless act. Ex post facto can be accomplished not only by legislative enactment but by judicial decision. In Bouie v. City of Columbia, 378 U.S. 347, the United States Supreme Court held that a state court in giving retroactive application to enactment of a new statute, had deprived petitioners of their right of fair warning of a criminal prohibition and there was a violation of the due process clause of the Fourteenth Amendment.

It is clear that free x-rays were not prohibited by the old statute, and that in the case at bench only discounts for professional services were proscribed. The courts below, in holding that an offer for free x-rays was included in the word "discount" held contrary to the intention of the legislature as expressed in the enactment of the new statute.

A judicial expansion of narrow and precise statutory language, which deprives a defendant of fair warning is prohibited. Pierce v. United States, 314 U.S. 306.

The defendant is entitled to the benefit of any reasonable doubt as to the interpretation of words or the construction of language used in a statute. Yates v. United States, 354 U.S. 298.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue, to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

MELVYN B. STEIN

Counsel for Petitioners

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EUGENE ANDERSON, LUVERNE L. ANDERSON, WAYNE A. ANDERSON, and RAYMOND G. NULL, Appellants, v. STATE OF CALIFORNIA, etc., Appellee.	FILED JUN 19 1972 CLERK No. 71-1524

Before: CHAMBERS, ELY and HUFSTEDLER, Circuit Judges.

O R D E R

PER CURIAM:

This case is indistinguishable from Flynn v. State Board of Chiropractic Examiners (9th Cir. 1969) 418 F. 2d 668. The order of dismissal is affirmed.

Judge Ely concurs in the result.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JUL 17 1972
CLERK

EUGENE ANDERSON, LUVERNE L. ANDERSON, WAYNE A. ANDERSON, and RAYMOND G. NULL,

Appellants,

v.

STATE OF CALIFORNIA, etc.,

Appellee.

No. 71-1524

ORDER

Before: CHAMBERS, ELY, and HUFSTEDLER, Circuit Judges

The petition for rehearing is DENIED.